(11)

Supreme Court, U.S.
FILED
MAR 11 2002
CLERK

No. 01-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

---

REPLY BRIEF FOR PETITIONERS

HARRY LITMAN
900 Penn Avenue
Pittsburgh, PA 15222
(412) 456-0999

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

25 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION 1

A. Respondent's Due Process Claim Would Apply to Much Routine Conduct and Would Anchor a Wide Range of Dubious Legal Claims 1

B. Respondent's Substantive Due Process Claim Lacks Precedential Support 8

C. Respondent Has No Due Process Claim Since She Was Never Denied Access to the Courts 10

D. Respondent Has No Cognizable *Bivens* Action . 12

III. QUALIFIED IMMUNITY IS APPROPRIATE 17

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE

Cases

Albright v. Oliver, 510 U.S. 266 (1994) 10
Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) . 17, 18
Bell v. City of Milwaukee,
746 F.2d 1205 (7th Cir. 1984) 17, 18, 19
Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) ..... *passim*
Bounds v. Smith, 430 U.S. 817 (1977) 9
Brady v. Maryland, 373 U.S. 83 (1963) 8
Bush v. Lucas, 462 U.S. 367 (1983) 13, 14, 15
Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996) 13
Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948) 18
Collins v. City of Harker Heights, 503 U.S. 115 (1992) ... 8
Correctional Servs. Corp. v. Malesko,
122 S. Ct. 515 (2001) 13, 14
Crawford-El v. Britton, 523 U.S. 574 (1998) 6
Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989),
cert. denied, 496 U.S. 924 (1990) 9, 10, 19
Davis v. Passman, 442 U.S. 228 (1979) 13, 14
Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) 10, 19
DeShaney v. Winnebago County Dep't of Social Servs.,
489 U.S. 189 (1989) 8, 9
Ellis v. Magee & Devereux, 2001 WL 167744
(E.D. La. Feb. 15, 2001) 19
FDIC v. Meyer, 510 U.S. 471 (1994) 16
Foster v. City of Lake Jackson,
28 F.3d 425 (5th Cir. 1994) 19
Kyles v. Whitley, 514 U.S. 419 (1995) 8
Lassiter v. Department of Social Servs.,
452 U.S. 18 (1981) 8
Lebron v. National R. Passenger Corp.,
513 U.S. 374 (1995) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Lewis v. Casey, 518 U.S. 343 (1996) 8, 9
Little v. Streater, 452 U.S. 1 (1981) 8
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 11
Malley v. Briggs, 475 U.S. 335 (1986) 20
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ... 9, 17
M.L.B. v. S.L.J., 519 U.S. 102 (1996) 8
Office of Personnel Mgmt. v. Richmond,
496 U.S. 414 (1990) 16
Ohio v. Robinette, 519 U.S. 33 (1996) 13
Papasan v. Allain, 478 U.S. 265 (1986) 12
Parratt v. Taylor, 451 U.S. 527 (1981) 10
Procunier v. Navarette, 434 U.S. 555 (1978) 19
Reno v. Catholic Social Servs., Inc.,
509 U.S. 43 (1993) 13
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) .. 17, 18, 19
Saucier v. Katz, 121 S. Ct. 2151 (2001) 19
Schweiker v. Chilicky, 487 U.S. 412 (1988) 13, 14, 15
Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 11
Swekel v. City of River Rouge,
119 F.3d 1259 (6th Cir. 1997) 10, 19
United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 16
Washington v. Glucksberg, 521 U.S. 702 (1997) 9
Wilson v. Layne, 526 U.S. 603 (1999) 20
Yee v. Escondido, 503 U.S. 519 (1992) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. V ..... *passim*
S. Ct. R. 14.1(a) 13
Freedom of Information Act, 5 U.S.C. § 552 ..... *passim*
5 U.S.C. § 552(a)(3) 14
5 U.S.C. § 552(a)(4)(E) 14
5 U.S.C. § 552(a)(4)(F) 15
5 U.S.C. § 552(a)(6)(A) 14
5 U.S.C. § 552(a)(6)(E) 14
5 U.S.C. § 1216(a)(3) 15

REPLY BRIEF FOR PETITIONERS

Respondent's brief highlights the expansive scope of the constitutional claim she asserts in this case, for her unbounded allegations could arise just as easily in the wake of countless routine encounters between citizens and public officials. Moreover, her formulation of the substantive due process right effectively sweeps in a wide range of otherwise dubious legal claims and remedies – whether or not they were pursued or are even credible. The entire discussion thus demonstrates that her alleged right-of-access claim is not a narrow constitutional path for individuals who are barred from accessing the courts, but a broad legal boulevard that would permit redress against any government official who does not affirmatively aid an inquiring citizen, even when under no legal duty to do so. Respondent clearly does not state a proper claim for relief in this case and, even if she did, petitioners are entitled to qualified immunity.

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION.

A. Respondent's Due Process Claim Would Apply to Much Routine Conduct and Would Anchor a Wide Range of Dubious Legal Claims.

The recurring theme in the arguments of respondent and her *amici* is that this is an extraordinary case involving allegations of shockingly egregious misconduct – *i.e.*, that petitioners knew about and were complicit in the alleged torture and murder of Bamaca. These sensational characterizations serve two functions. First, they falsely portray petitioners in the most corrupt and monstrous terms. Second, and more important, they suggest to the Court that affirmance of the decision below would have little practical effect, because the facts are so extreme and unusual. The aim is thus to reassure the Court that it can recognize the newfangled right-of-access claim advanced by respondent with minimal doctrinal disturbance. *See, e.g.*, ACLU Br. 2-4 (given the ostensibly "exceptional factual allegations" here, it is vital to "refrain from reaching out for

complex and far-reaching issues" involving the right of access). This suggestion, however, is demonstrably incorrect; in fact, the ruling below is inherently far-reaching because, among other things, it triggers constitutional claims based on allegations that could be launched in the wake of virtually any request for information made to a government official.

Respondent's complaint lays out a broad-based attack on American policy in Guatemala over the last decade, including widespread accusations of complicity in various misdeeds by officials at the CIA, NSC, and Department of State. With these generalized accusations as a platform, respondent and her *amici* aver that petitioners lied repeatedly to prevent respondent from pursuing legal remedies when they personally knew that Bamaca was even then alive and being tortured by CIA operatives. *See, e.g.*, Resp. Br. 2-5; BCJ Br. 3-4; ACLU Br. 2-3.

On closer scrutiny, even under the indulgent standards that apply at this threshold stage, these characterizations are reckless, if not fanciful. The actual record before the Court advances a far less colorful and far more commonplace set of allegations with respect to these petitioners. Thus, a review of the complaint in this case yields, at most, the following allegations that touch on *petitioners'* actual conduct:

> (1) in March of 1993, after respondent learned from an escaped prisoner that her husband was alive and being tortured, she contacted some State Department officials (apparently *not* petitioners), told them what she had learned, and asked for information about her husband. The unidentified officials promised to look into the matter and assist her, but never provided her any information. *See* J.A. 29-30 (Complaint ¶¶ 55-58);

> (2) in August of 1993 – at most a month before Bamaca's death, if not after it[1] – respondent opened Bamaca's grave and discovered the body was not his. She immediately informed petitioner McAfee, who said she would investigate the matter and keep respondent informed, but never provided her any information. *See id.* at 30-31 (Complaint ¶¶ 60-64); and
>
> (3) in November 1994 (well after Bamaca's death), petitioner Lake told respondent, incorrectly, that no further information existed about Bamaca. *See id.* at 34 (Complaint ¶¶ 83).

These alleged acts of deception bear no resemblance to the "extraordinary" instances of "egregious" misconduct that respondents and her *amici* assert as grounds for this lawsuit. Indeed, it is hard to imagine an informal request for information, such as respondent's, that could *not* give rise to an allegation that the government official promised, falsely, to give more help than he did or asserted that he had less information than was actually available, with at least some intent to avoid litigation. While respondent insists that a so-called *Glomar* response of "no comment" would be fully acceptable, Resp. Br. 21-22, even

---

[1] Based on respondent's allegations in the complaint, Bamaca died no later than September of 1993 – when, according to the complaint, the Defense Intelligence Agency reported that he had been executed. *See* J.A. 31 (Complaint ¶ 66); *see id.* at 27 (Complaint ¶ 36) (stating that Bamaca was detained and tortured for "approximately one year" following his capture in March of 1992). That time frame, of course, poses nearly insuperable obstacles for respondent's claim that but for petitioners' alleged lies, she would have executed a dizzying series of maneuvers that would have inexplicably resulted in preventing Bamaca's death at the hands of the Guatemalan army, since the entire chain of events would have had to occur in at most one month. Hence respondent now asserts – with no explanation and in direct contradiction of her own complaint and the record before the Court – that there is "[n]ew evidence suggesting that Mr. Bamaca in fact survived well into 1994 if not longer." Resp. Br. 23 n.3.

this response would not immunize the official if the plaintiff alleged that it was made with an intent to conceal information in order to forestall a lawsuit. The critical point here is not that petitioners' alleged misconduct (none of which, of course, has been proved) is more benign than portrayed. It is rather that the same kinds of allegations routinely can be made, and in fact are made, of any government official who fields a request for information. Thus, the vague limiting principle that respondent and her *amici* suggest for the ruling below – that it applies only in extraordinary cases of egregious misconduct – vanishes in light of the garden-variety allegations actually presented here.

But the scope of respondent's asserted constitutional claim goes from broad to breathtaking in view of the state-of-mind component adopted by the court of appeals and urged here by respondent and *amici*. Under this theory, a plaintiff need only allege that a deceptive statement by a government official impaired her ability to bring a legal claim or to secure a legal remedy, and that at least one of the motives for the deception was to prevent a suit against the government.[2]

As our opening brief detailed, such a claim by its terms could apply to a wide range of vital and unexceptionable government conduct, including undercover investigations and sting operations, cagey replies to requests for information about military or covert operations, and deflections of inquiries about contemplated regulatory action. *See* Petr. Br. 18-21.

Respondents and her *amici* have no tenable response. They recognize the illegitimacy of chilling such conduct, but demur that the examples are beside the point because they all pertain to alleged deceptions for admirable purposes. *See, e.g.*, Resp. Br. 19 (conceding need for "appropriate investigation techniques" in law enforcement); BCJ Br. 13-14. This response could not

[2] Respondent and her *amici* do not contest petitioners' observation that the ruling below would apply whenever a plaintiff could allege that some irreparable harm occurred as a result of a government official's nondisclosure or misstatement of information. *See* Petr. Br. 19.

be more wrong; indeed, it proves the very point it is supposed to rebut.

In particular, the response completely fails to address what is perhaps the most problematic aspect of the ruling below: under the elastic standard asserted by respondent and accepted by the court below, a plaintiff need only allege that, regardless of any other good intentions, the government official had *some further* motivation of avoiding a lawsuit. *See* Pet. App. 23a. The examples cited above may well involve only "good" motives,[3] but there is *absolutely no way to establish that fact* at the motion to dismiss stage, particularly since, as the court of appeals emphasized, "*any* ambiguities or doubts . . . must be resolved in favor of the pleader." Pet. App. 63a (emphasis original; quotation omitted). When the mixed-motive standard embraced by the court of appeals is combined with the permissive pleading rules that govern motions to dismiss, any such claim must proceed into litigation as long as the plaintiff has made the essentially unrebuttable allegation that the official had *some* motive to avoid a lawsuit.[4] Each of the hypotheticals that respondent and *amici* insist are fully constitutional becomes

[3] In fact, many such "good motives" – for example, preserving confidentiality – would necessarily entail preventing or delaying a lawsuit and hence, on the theory pressed by respondent and adopted by the court below, would give rise to a constitutional violation.

[4] Under the terms of the ruling below, a government official would be liable for a constitutional violation for making an allegedly deceptive statement for objectively unimpeachable reasons – such as protecting an informant's identity in an ongoing undercover investigation – if it so happened that the official also harbored some subjective motivation to prevent a lawsuit, which might even be essential to safeguard the success of the investigation. One of the *amici* says so explicitly: "That is not to say, however, that an official can avoid liability merely by asserting that his ultimate purpose was legitimate. Legitimate purposes may not be achieved via unlawful means." BCJ Br. 17. Of course, the defining characteristic of the asserted "unlawfulness" here is the objective – in whole or in part – to forestall a lawsuit.

presumptively unconstitutional (sufficient, that is, to survive a motion to dismiss) with the mere addition of such an irrefutable allegation. And if allegations about "an official's state of mind" are notoriously "easy to allege and hard to disprove," *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998), allegations that an official harbored some stain of improper motive are easier yet to allege, and harder if not impossible to disprove, without invoking the extensive apparatus of civil litigation.[5]

The constitutional claim advocated by respondent is yet more elastic. As framed by respondent and the court below, the right-of-access claim would comprehend a vast expanse of other constitutional, statutory, and common-law claims, however remote and tenuous.

Respondent's brief vividly illustrates the immense reach and flexibility of the asserted constitutional right. *See* Resp. Br. 24-33. She sets out a skein of hypothetical legal claims and remedies that she now asserts she might have pursued but for petitioners' alleged improper concealments. These include (among others) a substantive due process claim for deprivation of her "protected liberty interests in the orderly pursuit of happiness" (*id.* at 25); a claim for abridgement of her liberty

[5] *Amici* relies on *Crawford-El* to suggest that any concerns about the broad scope of respondent's unprecedented claim can be mitigated by other judicial strategies, such as enforcing the causation requirement or exercising control over discovery. *See* BCJ Br. 15-16. In *Crawford-El*, however, the Court simply declined to fashion a heightened burden of proof for established constitutional claims involving allegations of improper motive. *See* 523 U.S. at 584-601. The case in no way supports recognition of a new constitutional claim hinging entirely on allegations of partial bad motive, nor does it address the anomaly, as a matter of interpretation, of announcing a new substantive due process rule that reaches a wide range of routine and often vital government conduct. Indeed, the fact-driven "burden-shifting" procedure suggested by the *amici* confirm that bare allegations about mixed motives would propel many dubious and hypothetical claims past the initial threshold and into the arena of full-blown litigation. *See* BCJ Br. 16.

interest in having Congress insist on Bamaca's "humanitarian treatment or his right to a fair trial" (*id.* at 24); a claim for violation of her fundamental rights to marry, remain married, and preserve her family under the "penumbra of privacy" extended to "all aspects of family affairs" (*id.* at 26); and criminal conspiracy by government officials to torture Bamaca in violation of the due process "shocks the conscience" test (*id.* at 28-30). Based on these claims, she asserts that she would have sought a declaratory judgment and "[i]njunctive relief requiring that all remaining information regarding Mr. Bamaca be immediately transferred to the United States Congress so that its members might assist Ms. Harbury through appropriate diplomatic channels," and prohibiting "the failure to properly supervise assets engaged in Mr. Bamaca's torture." *Id.* at 32.[6]

As the Court is well aware, a number of these theories rest on shaky if not discredited legal ground, but our point here is not to belittle the various claims that she now propounds. To the contrary, the salient point is that under the ruling below, even highly questionable and largely conjectural legal claims can found the basis for a constitutional violation, though ultimately they might well have proven meritless. Respondent concedes as much, asserting that a right-of-access claim must be allowed to proceed as long as the underlying claim that would have been brought satisfies a "reasonable basis" test. Resp. Br. 33. The claim thus works a remarkable kind of doctrinal alchemy, transforming legal dross into good constitutional currency.

Thus, the constitutional claim minted in the court of appeals plainly extends well beyond occasional "extraordinary" cases of "egregious" misconduct. The claim, in fact, would apply to a wide swath of routine interactions with government officials (as this case actually illustrates). In addition, respondent's brief

[6] It is telling that these scattershot claims are entirely different from the theory she asserted in the court of appeals, which was that she could have sought an emergency injunction in a state-law tort action for intentional infliction of emotional distress. *See* Pet. App. 24a.

shows that her expansive version of the right-of-access claim can be premised on a salvage yard of underlying legal claims, whose hypothetical reach is virtually boundless. The Court has resisted just such pitfalls by remaining "reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Accordingly, the Court should decline the invitation to announce such an amorphous and wide-ranging supplement to its existing jurisprudence.

B. Respondent's Substantive Due Process Claim Lacks Precedential Support.

Respondent and her *amici* contend that the right-of-access claim asserted in this case is squarely grounded in established precedent and the traditions of Anglo-American law. *See* Resp. Br. 10-17; ATLA Br. 3-11. But their legal snippets, broad pronouncements, interpretive principles, and inapposite criminal precedents do not suffice as a foundation for the substantive due process right asserted in this case. In assessing respondent's constitutional claim, it is decisive that "the Due Process Clauses generally confer no affirmative right to governmental aid." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989); *Lewis v. Casey*, 518 U.S. 343, 354-55 (1996) (Due Process Clause does not require officials to take affirmative steps to enable prisoners to "discover grievances" and "to litigate effectively"). For that is, at bottom, what respondent's right-of-access claim would require.

In addition to the two lines of decisions already analyzed in petitioners' opening brief, *see* Petr. Br. 13-19,[7] respondent cites cases such as *Brady v. Maryland*, 373 U.S. 83 (1963), and

[7] *Little v. Streater*, 452 U.S. 1 (1981), and *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), both involve "state controls or intrusions on family relationships," *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Respondent's claims do not fit within that "narrow category of civil cases." *Id.* at 113. *See* Petr. Br. 14-15.

Kyles v. Whitley, 514 U.S. 419 (1995). These criminal cases of course arise only because the government has initiated compulsory proceedings designed to result in valid deprivations of the defendant's life or liberty. In that particular setting, the due process requirement that exculpatory information be disclosed is imposed to secure the criminal defendant's right to a fair trial. In some loose sense, these decisions thus bear some relation to cases like *Lewis* and *Bounds v. Smith*, 430 U.S. 817 (1977), but none of them even begins to provide a separate right outside the context where "the State's affirmative act of restraining the individual's right to act on his own behalf" constitutes "the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney*, 489 U.S. at 200. *See generally Crowder v. Sinyard*, 884 F.2d 804, 811-12 (5th Cir. 1989) (explaining why these cases "are of little assistance" in "the world of litigation outside prison walls"), *cert. denied*, 496 U.S. 924 (1990).

Respondent's *amici* has collected a mass of general authorities going all the way back to the Magna Carta in order to bolster "the right to obtain redress from the courts," ATLA Br. 5, including cases applying specialized provisions of state constitutional law and other more venerable precedents such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See* ATLA Br. at 3-11; ACLU Br. 8-14. The level of analysis, however, is far too abstract: for example, it surely would have surprised Chief Justice Marshall to learn that the Supreme Court's inability to provide a lawful remedy to right the wrong done to William Marbury would implicate a substantive due process right of access to the courts. *See* 5 U.S. at 163. In the end, these citations offer little to satisfy the demanding standards of "utmost care" that must be applied when the Court is "asked to break new ground in this field" of substantive due process and thereby "place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quotation omitted).

C. Respondent Has No Due Process Claim Since She Was Never Denied Access to the Courts.

Petitioners also contend that the right-of-access claim asserted by respondent, even if cognizable as a general matter, requires her to show *an actual bar* to her ability to access the courts. In this case, as in *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), her claim is not valid unless she can establish that defendant's conduct rendered "'*any* available state court remedy ineffective.'" *Id.* at 1222-23 (quoting *Swekel*, 119 F.3d at 1264) (emphasis added). Because she never even attempted to file suit before bringing her right-of-access claim, though the courts were always open to her, she cannot "show *absolute denial* from state court." *Swekel*, 119 F.3d at 1264 (emphasis added). In short, a claimant cannot establish a violation of the right of access without showing her actual inability to access the courts. No matter how "functional" the due process analysis should be, ACLU Br. 8, this element must be a clear prerequisite to any such claim.

Respondent argues instead that she was not fully armed with the information she needed to pursue and secure an immediate injunction. But the Court has never held that the Due Process Clause guarantees the right to a particular remedy, *see, e.g.*, *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981); *Crowder*, 884 F.2d at 813-14, and this rule must be the same in both procedural and substantive due process cases, *cf. Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring). Petitioners have noted that many remedial avenues are available to redress the conduct alleged in this case, *see* Petr. Br. 27-29, and have pointed out that respondent has availed herself of most, if not all, of them, *see id.* at 36 n.13. And though respondent argues that going to court to try to save her husband now that he is already deceased would be "futile," Resp. Br. 33-35, this argument does not attempt to suggest that the courts were not open to her *at the time*, nor does it explain why she should now be able to assert a substantive due process claim

after she simply chose not to pursue her legal remedies, for whatever reason. Indeed, her filings make it clear that she had ample motivation and ability to pursue a legal claim, notwithstanding her allegations of being lulled into inaction.

Because the court of appeals did not insist on any showing of an actual bar to suit, it was forced to traffic in legal hypotheticals about what claims respondent might have brought and what relief she might have obtained. This approach was problematic enough in the court below, but before this Court it has come completely unmoored. With respondent's ingenuity as the only apparent limit, she has now tendered several extravagant new claims in her merits brief. *See* Resp. Br. 22-33.

All of these hypothetical claims, however, suffer from a common defect: respondent cannot meet the minimal threshold for standing to bring suit, which in turn would doom her right-of-access claim. The chain of arguments has been fully set out and will not be repeated here. *See* Petr. Br. 29-33. Respondent and her *amici* have surprisingly little to say here. Respondent rests on mere *ipse dixit* that the judicial relief she hypothesizes would have been secured and that it is "highly probable" the order of a U.S. court "would have been enough to compel Mr. Bamaca's release [by the Guatemalan army] to the courts of law for a fair trial." Resp. Br. 32-33. Her *amici* rest on a bare claim of "actual injury," making no effort to deal with the mandatory causation and redressability prongs of the standing doctrine. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976). Most telling of all, neither respondent nor *amici* offers any explanation of how an injunction against federal officials (assuming she somehow managed to surmount the formidable hurdles to securing such an order) could have prevented Bamaca's death at the hands of the Guatemalan military.

It might be argued that such license is permissible on a threshold motion to dismiss. Yet the Court has spoken directly to the limits of such indulgence: "Although, for purposes of this

motion to dismiss, we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 287 (1986). Here the independent decisions of third parties would be involved in the final step toward effective relief, and those third parties – foreign military personnel – are even less amenable to American judicial process than in more typical standing cases. Hence the conclusions respondent asks the Court to draw are simply unsupportable as a matter of law.

In a weak response to this dilemma, respondent and her *amici* make an effort to transform her constitutional claim into a complaint about the failure *timely to disclose* information. *See, e.g.*, Resp. Br. 21 (information should have been "timely disclosed"); *id.* at 16 (she was discouraged from filing FOIA requests sooner); ACLU Br. 2-3 (if not misled, she "would have pursued a FOIA request immediately," learned the truth, and brought suit to save Bamaca). This too fails, both as a factual matter (declassification takes time, and her allegations left only a month at most to complete all the steps needed to secure the relief she ultimately sought) and as a legal matter (adding extra steps to the causal chain complicates standing even further). As the district court correctly noted, an alleged cover-up "cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset." Pet. App. 47a n.4.

D. Respondent Has No Cognizable *Bivens* Action.

In response to the argument that she has no cognizable *Bivens* action, respondent contends that the Court cannot entertain the argument for procedural reasons and that it would be appropriate here to extend *Bivens* to this new context. *See* Resp. Br. 43-46; ACLU Br. 14-25.

The *Bivens* argument, though not separately raised below, is "fairly included" in the first Question Presented: whether respondent has stated a valid claim for "a violation of the constitutional right of access to the courts." Petr. Br. i; *see* S. Ct. R. 14.1(a). This is so because deciding whether her due

process claim can be asserted in a *Bivens* action is "'predicate to an intelligent resolution of the question presented'" of whether she has a valid due process claim in this case, and here the parties have briefed the issue and are able to present argument upon it. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)) (internal quotes omitted). In addition, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National R. Passenger Corp.*, 513 U.S. 374 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Finally, the Court's self-imposed caution about implying constitutional remedies where Congress already has provided a comprehensive statutory scheme is a prudential jurisdictional doctrine grounded in the separation of powers. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1988). As such, it can be raised on the Court's own motion and will be considered "fairly included" within the questions presented on the merits, especially when "both parties have touched on it in their briefs." *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Thus, the question is appropriate for the Court's resolution here.

On the merits, respondent's defense of her *Bivens* claim is unpersuasive. In *Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515 (2001), the Court recently stressed its longstanding "caution toward extending *Bivens* remedies into any new context." 122 S. Ct. at 523. In only one case has the Court upheld a *Bivens* claim based on the Due Process Clause, and in that case the claim was for sexual discrimination premised on the equal protection component of the Fifth Amendment's Due Process Clause. *See Davis v. Passman*, 442 U.S. 228, 230-32 (1979). Thus there is no doubt that respondent is asking the courts to extend *Bivens* into a new context here. Furthermore, the Court has stated that it inferred a new *Bivens* action in *Davis* "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko*, 122 S. Ct. at 520;

see Davis, 442 U.S. at 230-33 & n.4. As noted already, respondent has not lacked for remedies through legal, political, and administrative processes, which she has vigorously pursued and continues to pursue. *See* Petr. Br. 27-29 & 36 n.13.

In addition, respondent and her *amici* do not adequately address the "special factors counseling hesitation" in recognizing a *Bivens* claim in the context of this case. *Bush*, 462 U.S. at 380; *Schweiker*, 487 U.S. at 423. A principal "special factor" here is that respondent's due process claim concerns the withholding of information and thus implicates the detailed statutory scheme embodied in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

Periodically throughout her brief, respondent appears to acknowledge that the proper implementation of this statutory mechanism provides the true gravamen of her dissatisfaction with petitioners here. *See, e.g.*, Resp. Br. 16 ("But for this deception, she could have obtained the documents through administrative requests under [FOIA]"); *id.* at 22 (petitioners should have informed her "that information might or might not exist, and she would have swiftly moved to ascertain the matter by resort to FOIA"). Nonetheless, respondent argues that FOIA provides *no* remedies for such claims and that, in any event, her claims transcend the mere withholding of information because they involve deliberate lies allegedly told to her by petitioners. *See* Resp. Br. 45-46.

The first argument never comes to grips with the comprehensive procedural and substantive mechanisms provided in FOIA, which includes, directly contrary to respondent's assertion, detailed avenues for obtaining judicial relief and sanctions against officials who improperly withhold requested information. *See e.g.*, 5 U.S.C. § 552(a)(6)(A) (duties and deadlines to requests for information); *id.* § (a)(6)(E) (expediting requests); *id.* § (a)(3) (*de novo* judicial review with agency bearing burden to justify nondisclosure); *id.* § (a)(4)(E) (attorney fees and other litigation costs for parties who prevail

in court); *id.* § (a)(4)(F) & 5 U.S.C. § 1216(a)(3) (disciplinary measures against officials who withhold information "arbitrarily or capriciously"). FOIA is thus indeed an "elaborate comprehensive scheme that encompasses substantive provisions forbidding arbitrary action . . . and procedures – administrative and judicial – by which improper action may be redressed." *Bush*, 462 U.S. at 385.[8] And the Court has held that any such comprehensive regulatory scheme precludes a *Bivens* remedy as long as it provides meaningful, even if incomplete, relief for alleged constitutional deprivations. *See Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 378.

Respondent's other argument simply distorts the facts alleged in her complaint. She contends that FOIA does not address "issues of intentional acts of deception geared to prevent a citizen from filing suit against the government." Resp. Br. 45-46; *see* ACLU Br. 20-21 (FOIA was "hardly intended to provide a remedy for plaintiffs victimized by affirmative misrepresentations by government"). But the complaint in this case does not allege misrepresentations made on *general topics* or even misrepresentations about the whereabouts and circumstances of Bamaca – instead, it solely concerns alleged misstatements that were made *about whether information existed and what steps would be taken to ascertain and divulge it*. *See supra* pages 2-3; *see also* J.A. 29-31, 34 (Complaint ¶¶ 55-58, 60-64, 83). Treatment of *these* matters is undeniably

---

[8] As described in our opening brief, respondent's allegations show that she was well aware of the availability of these legal processes and availed herself of them constantly. *See* Petr. Br. 18 n.3, 36 n.13. Her complaint thus boils down to this: although she knew all along that other information might or might not exist, and although she felt all along that information was being withheld, *see* J.A. 31, 34-35 (Complaint ¶¶ 64, 85), she is now entitled to assert a substantive due process claim because she chose – and perhaps was encouraged – to pursue the matter initially through informal channels rather than through the formal channels that were always available to her, which in hindsight proved more effective.

central to FOIA's statutory scheme with its comprehensive provisions for administrative and judicial relief.[9]

Petitioners have also noted another special factor counseling hesitation here, which is that respondent's suit would require the courts to interfere with "the ability of the political branches to respond to foreign situations involving our national interest." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990); *see* Petr. Br. 38-39. Respondent's threadbare assertions to the contrary are contradicted by her own allegations elsewhere. *Compare* Resp. Br. 44-45 *with id.* at 31, 42 (invoking "foreign affairs" policies and principles). *Amici*'s arguments that all such matters should be treated by litigating a national security defense (but in any event that such authority "should not become a license to lie to citizens"), ACLU Br. 21-22, provide little reassurance on this point. Respondent's allegations concern whether the highest-ranking State Department and NSC officials may legitimately conceal or withhold information from her – even if necessary through deception – about their knowledge of covert operations amidst a civil war that is taking place in a foreign country. This dispute, which originated in a generalized attack on U.S. policies in Guatemala, doubtless touches directly on the appropriate

---

[9] Although respondent does not address the point, her *amici* correctly observe that the impact on the public fisc was not well explained in our opening brief, as the federal treasury would not be *directly* affected by allowing constitutional claims based on nondisclosures and misrepresentations by government officials. *See* ACLU Br. 22-25; BCJ Br. 25. It nevertheless blinks reality to suggest imposing liability in such circumstances would not have a staggering and immediate impact upon the public administration (including the terms on which information is provided to the public, *see Office of Personnel Mgmt v. Richmond*, 496 U.S. 414, 433-34 (1990)) and upon the government's ability to hire and retain hundreds of thousands of employees on the same terms of employment, which in turn would create a "potentially enormous financial burden for the Federal Government." *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

conduct of U.S. foreign policy. Accordingly, the posture of this case surely counsels hesitation in launching new *Bivens* claims into such perilous and uncharted waters.

III. QUALIFIED IMMUNITY IS APPROPRIATE.

Respondent's arguments that petitioners do not enjoy qualified immunity in light of the unprecedented nature of the ruling below are completely unpersuasive. First, respondent barely even tries to suggest that this Court's precedents foreclose qualified immunity. She briefly adverts back to her discussion of an accused suspect's right to a fair hearing *in a criminal prosecution*, *see* Resp. Br. 49, which is inapposite for the reasons discussed in Section I.B, *supra*. She also offers one extremely general reference to *Marbury* – which, as discussed above, is a case about many things, but which certainly did not establish any substantive due process right of access to the courts. Moreover, respondent never contends that any court of controlling authority within the relevant jurisdiction had ever addressed this issue. In fact, no prior case from the District of the District of Columbia had ever discussed this claim, let alone upheld it, and the lower courts cited no such precedents.

The entirety of respondent's qualified immunity argument rests on her unexplained contention that the trio of lower court decisions in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), and *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), had clearly established the unconstitutionality of petitioners' conduct at the time they acted. *See* Resp. Br. 48-49; BCJ Br. 26-30. These decisions were fully canvassed in petitioners' opening brief, together with other case law calling into question the notion that the pertinent authorities were consistent, clear, and settled. *See* Petr. Br. 42-46. But three points deserve further attention here.

First, these cases all concerned situations in which the defendant officials withheld, misrepresented, and even destroyed

information in furtherance of a course of criminal conduct and in violation of their known legal duties. *See Barrett*, 798 F.2d at 575-76 (emphasizing that defendants had allegedly suborned perjury and obstructed discovery in pending litigation, conduct that itself "was also a crime" and thus violated explicit legal duties under "currently prevailing law"); *Bell*, 746 F.2d at 1214-22, 1264-65 (expressly limiting its holding "to the particularly egregious set of facts herein," in which one officer was convicted of homicide and several officers confessed to committing perjury and obstruction of justice); *Ryland*, 708 F.2d at 969-70 (prosecutors falsified evidence and obstructed justice in ongoing criminal investigation, which violated their plain legal duty "to enforce the criminal laws of Louisiana," as well as their obligation as citizens to abide by those laws).

Thus the defendants in each of these cases were guilty of independent criminal violations that deprived plaintiffs of the essential components of the "due process of law." *See* Pet. App. 47a-48a. Try as she might to stretch the allegations in her complaint, respondent does not and cannot assert that petitioners ever violated the criminal laws or contravened any independent legal duties in this case.

Second, the fact that some lower court decisions have upheld a particular legal claim does not create clearly established law *whenever* a plaintiff invokes such a claim, including in novel circumstances far removed from the previous decisions. This case arises in the very different (and highly sensitive) arena of foreign affairs and our government's posture towards quasi-military operations in other countries. Respondents' cases do not remotely present such a setting, which also counsels against judicial interference with executive authority. *See, e.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The fact that officials should clearly have known that they could not falsify evidence and obstruct justice in no way establishes that they should have been similarly certain that they could not deflect, even with deception, inquiries about sensitive matters of foreign policy. For this reason also, the decisions

cited by respondent must be viewed as having upheld constitutional claims on facts that are readily "distinguishable in a fair way from the facts presented in the case at hand." *Saucier v. Katz*, 121 S. Ct. 2151, 2157 (2001).

Third, as discussed at length in our opening brief, other lower court decisions cast considerable doubt on respondent's efforts to portray a persuasive consensus of authority here. *See, e.g.*, *Crowder*, 884 F.2d at 814 (rejecting right-of-access claim as a merely "facilitative right" that cannot be invoked where complainants "had 'access' to the Texas courts" at all times); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 n.7 (5th Cir. 1994) (framing the right in terms of an ability "to institute suit," and explicitly questioning "*Bell*'s reliance on *Ryland* for any broader definition of [the] right of access"); *Swekel*, 119 F.3d at 1264 (plaintiff must show "absolute denial from state court"); *Delew*, 143 F.3d at 1223 (defendants' conduct must render "*all* state court remedies ineffective") (emphasis added).

These other decisions show that the case law cannot be read to endorse respondent's sweeping due process claim. Indeed, one objectively reasonable observer – a federal district court – recently concluded that the ruling below was in square conflict on the merits of the right-of-access issue with the Fifth Circuit's controlling case law (let alone the Sixth and Ninth Circuits). *See Ellis v. Magee & Devereux*, 2001 WL 167744, at *2 & n.3 (E.D. La. Feb. 15, 2001) (D.C. Circuit ruling gives "the right of access to courts a broader definition than that recognized in this circuit"). Another objectively reasonable observer – the district court here – noted that the lower courts continue to disagree, even now, about the merits of the substantive due process issue. *See* Pet. App. 46a & n.2. Where, as here, there is no consensus about the proper *contours* and *application* of a particular claim, it plainly is *not yet* clearly established.

A clarion principle of the qualified immunity doctrine is that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555,

562 (1978). "If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Petitioners have discussed in detail various reasons why respondent's claims are not actionable here. That discussion surely shows that if the Court were to hold in this case that petitioners committed some sort of cognizable infraction, they at least did not violate constitutional rights that were clearly established at the time. To the contrary, "the constitutional question presented by this case is by no means open and shut," especially given the sensitive backdrop here trenching on concerns about foreign affairs and covert military operations around the globe. *Id.* at 615.[10]

CONCLUSION

For all of the reasons stated, the judgment below should be reversed, and the case remanded with instructions to dismiss the remaining *Bivens* claim brought against petitioners.

Respectfully submitted,

HARRY LITMAN
900 Penn Avenue
Pittsburgh, PA 15222
(412) 456-0999

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

March 2002

---

[10] *Amici*'s reliance on the Court's refusal to find qualified immunity after granting certiorari in *Malley v. Briggs*, 475 U.S. 335 (1986), is unavailing. *See* BCJ Br. 30 & n.18. *Malley* concerned not whether a particular body of law was clearly established, but the highly specific question of whether a police officer's actions in applying for a warrant are *per se* objectively reasonable, provided the officer believes the facts alleged in his affidavit are true. *See* 475 U.S. at 345.